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No. 98-607

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JERRY GOETZ, D/B/A JERRY GOETZ AND SONS, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Petitioners,

v.

DAN GLICKMAN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS WILLIE REIBEL, RODNEY AND LARRY MENSE, JAN LYONS, KANSAS LIVESTOCK ASSOCIATION, NATIONAL CATTLEMEN'S ASSOCIATION, AND NATIONAL LIVE STOCK AND MEAT BOARD

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QUESTIONS PRESENTED

1. Whether certiorari is warranted to consider whether, as both the Tenth and Third Circuits have concluded, adoption of the Beef Promotion and Research Act was within the legislative authority of Congress under the Commerce Clause.

2. Whether certiorari is warranted to review the Tenth Circuit's determination that the assessment imposed to fund the regulatory regime adopted in the Beef Promotion and Research Act does not constitute a tax.

3. Whether certiorari is warranted to review the decision of the Tenth Circuit upholding the Beef Promotion and Research Act against a First Amendment challenge, given this Court's recent decision in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997).

4. Whether certiorari is warranted to review the determination of the Tenth Circuit that the Beef Promotion and Research Act does not violate the equal protection component of the Fifth Amendment.

RULE 29.6 STATEMENT

The corporate intervenors-respondents below were the Kansas Livestock Association, the National Cattlemen's Association ("NCA"), and the National Live Stock and Meat Board ("NLSMB"). While the case was pending in the Tenth Circuit, the Beef Industry Council ("BIC") of the NLSMB and NCA merged the functions of the BIC into the NCA and renamed the NCA the National Cattlemen's Beef Association. Each of the corporate respondents is a non-profit corporation; none has any parent companies or nonwholly owned subsidiaries.

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Respondents Willie Reibel, Rodney and Larry Mense, Jan Lyons, Kansas Livestock Association, National Cattlemen's Association, and National Livestock and Meat Board respectfully request that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Tenth Circuit in this case.

INTRODUCTION

The Beef Promotion and Research Act ("the Act") requires cattle producers and importers to finance a national campaign

to promote beef sales, and thereby strengthen the Nation's cattle industry, by paying a $1 assessment on each head of cattle sold in the United States. Petitioner Jerry Goetz, a cattle producer who does not wish to pay such assessments, challenged the constitutionality of the Act on several grounds. In a virtually identical case, the Act was upheld against each of the claims raised by Goetz. *See United States* v. *Frame*, 658 F. Supp. 1476 (E.D. Pa. 1987), *aff'd*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990). The Tenth Circuit below reached the same conclusions, which are even more demonstrably correct in light of this Court's recent decision in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997).

None of the factors traditionally supporting plenary review by this Court is present. There is no conflict in the circuits on the issues presented in the petition, and petitioner in fact claims none. Nor has the Tenth Circuit decided "an important question of federal law" either "that has not been, but should be, settled by this Court," or "in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c). On the contrary, the Tenth Circuit's decision rests on a straightforward application of this Court's settled decisions involving the Commerce Clause, the taxing authority, the First Amendment, and the Fifth Amendment. Indeed, the First Amendment question is controlled by this Court's *Wileman* decision issued just last year.

There is, in short, no reason for this Court to grant plenary review, and the petition should be denied.

COUNTERSTATEMENT

The Statutory Scheme. The Beef Promotion and Research Act and its implementing regulations impose upon cattle producers and importers a $1 assessment on each head of cattle sold in the United States. Those assessments are used to fund the activities of two specially-created administrative bodies whose purpose is to promote the sale of beef through, among other things, the use of paid advertising. *See generally Frame*, 885 F.2d at 1122-24.

Congress' purpose in enacting the Act was to "strengthen the beef industry's position in the marketplace" through "a coordinated program of promotion and research" to be funded by "assessments on all cattle sold in the United States." 7 U.S.C. § 2901(b). Toward that end, the Act directs the Secretary of Agriculture ("the Secretary") to promulgate a "beef promotion and research order" ("the Order"). 7 U.S.C. § 2903(b). The Order and related regulations were issued by the Secretary in 1986. *See* 7 C.F.R. Part 1260.

As the Act mandates, the Order establishes two quasi-governmental bodies—the Cattlemen's Beef Promotion and Research Board ("the Cattlemen's Board" or "the Board") and the Beef Promotion Operating Committee ("the Operating Committee" or "the Committee")—to administer the program under the Secretary's supervision. 7 U.S.C. §§ 2904(1), (4)(A).

The Cattlemen's Board comprises cattle producers and importers appointed by the Secretary. 7 U.S.C. § 2904(1). The Act provides that the Cattlemen's Board shall, *inter alia*, "administer the order in accordance with its terms and provisions," "make rules and regulations to effectuate the terms and provisions of the order," and "elect members of the Board to serve on the Committee." 7 U.S.C. §§ 2904(2)(A), (B), (C).

The Committee is composed of ten members of the Board and ten members elected by a federation of state beef councils. 7 U.S.C. § 2904(4)(A). The Act directs that the Committee "shall develop plans or projects of promotion and advertising * * * which shall be paid for with assessments collected by the Board." 7 U.S.C. § 2904(4)(B).[1] Each person who purchases cattle from a cattle producer is re-

[1] The Act defines the term "promotion" to mean "any action, including paid advertising, to advance the image and desirability of beef and beef products with the express intent of improving the competitive position and stimulating sales of beef and beef products in the marketplace." 7 U.S.C. § 2902(13).

quired by the Act to collect the $1 per head assessments and remit them to the Board or a qualified state beef council. 7 U.S.C. § 2904(8)(A).

Petitioner's Allegations and Claims. Petitioner both produces and purchases cattle and accordingly is required to pay and collect assessments imposed by the Act. On October 29, 1993, the Secretary initiated proceedings against Goetz because he had not paid the required assessments. Goetz filed this action on August 2, 1994—six days before a scheduled hearing before an administrative law judge. In the district court, he alleged that he has "no desire" to associate with the Secretary, the Cattlemen's Board, the Operating Committee, or any state beef council with respect to "any matters related to the Beef Promotion Act." Complaint ¶ 35. He alleged further that he has "no desire" to "participate in, financially support, or otherwise be involved with any advertising campaign, or other promotional endeavor undertaken" in connection with the Act. Complaint ¶ 36.

For his legal claims, Goetz contended that the Act (1) exceeds Congress' power under the Commerce Clause (Complaint ¶ 40); (2) is an unconstitutional tax (Complaint ¶ 41); (3) impermissibly delegates legislative authority (Complaint ¶ 42); (4) violates the equal protection component of the Due Process Clause of the Fifth Amendment (Complaint ¶¶ 44-49); (5) violates the Takings Clause of the Fifth Amendment (Complaint ¶¶ 50-54); and (6) violates First Amendment rights of free speech, association, conscience, and belief (Complaint ¶¶ 55-79). He did not present his delegation and takings claims to the court of appeals, *see* Pet. App. 10, and we therefore do not address them further.

The Decisions Below. The district court dismissed petitioner's complaint in its entirety. In doing so, it endorsed and relied on the Third Circuit's decision in *Frame*. *See* Pet. App. 30 ("The defendant relies primarily on [*Frame*], in which the Third Circuit rejected a virtually identical challenge to the Act. This court finds the *Frame* decision persuasive and will follow it").

The district court rejected petitioner's claims that the activity being regulated does not substantially affect interstate commerce, and that Congress does not have the power under the Commerce Clause to stimulate and promote commerce. Pet. App. 31-39. It held that the assessment at issue was not a tax and therefore could not constitute an unapportioned direct tax. *Id.* at 39-40. On the First Amendment claim, the district court essentially adopted the Third Circuit's *Frame* decision, which upheld the Act's advertising requirements. *Id.* at 44. Finally, the court readily found that the Act passed muster under equal protection analysis. *Id.* at 44-46.

The Tenth Circuit affirmed. It first rejected petitioner's Commerce Clause arguments. Relying on this Court's decisions in *Hodel* v. *Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981), and *United States* v. *Lopez*, 514 U.S. 549 (1995), as well as the "well reasoned opinion of our sister circuit" in *Frame*, Pet. App. 15, the Tenth Circuit concluded that "under current Supreme Court precedent, Congress has validly exercised its commerce powers in enacting the Beef Promotion Act." *Id.* at 16. The court of appeals also found petitioner's direct tax argument wanting, concluding that the assessment was not a tax under settled precedent. *Id.* at 17-18.

The Tenth Circuit's First Amendment analysis relied on this Court's decision in *Wileman*—on which it had directed supplemental briefing. After explaining *Wileman* at some length, the court held that "under the Supreme Court's decision in *Wileman Bros.*, Goetz' First Amendment claim is fruitless." Pet. App. 20. Finally, the Tenth Circuit also endorsed the district court's application of the rational basis test to defeat petitioner's equal protection claim.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS PRESENTED BY PETITIONER ARE NOT THE SUBJECT OF ANY CONFLICT IN THE CIRCUITS AND DO NOT REQUIRE CONSIDERATION BY THIS COURT

This Court has explained that a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals." *Braxton* v. *United States*, 500 U.S. 344, 347 (1991). *See also* S. Ct. Rule 10(a). Although petitioner has presented no fewer than four questions that he believes merit this Court's use of its certiorari jurisdiction, he does not contend *as to any one of the four issues* that the decision below conflicts with the decision of any other United States court of appeals or, for that matter, with the highest court of any state. Nor could he. As the decisions below and the petition make clear, the only other case to have considered the constitutional challenges to the Act raised by petitioner was *Frame*, and the district court and court of appeals decisions in that case squarely reject those challenges. The courts in this case *endorsed* the decisions in *Frame*. There is no conflict.

Petitioner also makes no effort to establish that the Tenth Circuit's decision involved "an important question of federal law that has not been, but should be, settled by this Court," or that it resolved "an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c). The petition does not attempt to demonstrate any broader significance—other than petitioner's own dissatisfaction—in the questions on which he seeks this Court's review. There is no suggestion that the various constitutional attacks Goetz mounts on the Act are the subject of ongoing and widespread debate, either in the context of the Act itself or in analogous situations. Petitioner does not explain why the issues he presents are ones that "should be[] settled by this Court," or how the decision below "conflicts with relevant decisions of this Court." *Id.* In short, petitioner has utterly failed to demonstrate any "compelling reason" for this Court to grant certiorari. S. Ct. Rule 10.

At bottom, the petition contends only that the Tenth Circuit erred. Even if this contention were correct—and, as we demonstrate below, it assuredly is not—simple error by the court below has never been thought sufficient to warrant this Court's intervention. As Justice Harlan observed forty years ago, "[t]he fact that a case may have been wrongly decided as between the parties is not, standing alone, enough to assure certiorari." Justice Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 551 (1958), *quoted in* R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* 193 (7th ed. 1993). The petition should be denied because it fails to identify any basis for an exercise of this Court's certiorari jurisdiction.

II. THE TENTH CIRCUIT'S DECISION WAS CORRECT

None of petitioner's four constitutional attacks on the Tenth Circuit's decision has merit. Instead, it is clear that the court of appeals engaged in a straightforward and correct application of this Court's decisions to reject each of petitioner's claims.

A. The Commerce Clause. In his complaint, petitioner contended that the Beef Promotion and Research Act is not a valid exercise of Congress' commerce power because (1) the Act does not regulate any "*activity* directly or indirectly affecting interstate commerce"; (2) the Act "is not itself a *regulatory* program"; and (3) "[t]here is no rational connection between the [Act's] means * * * and [its] asserted ends." Complaint ¶ 40(c)-(e) (original emphases). The courts below considered and properly rejected each of these contentions, *see* Pet. App. 10-16; 31-39, and the petition does not squarely challenge any of the lower courts' conclusions in this regard.[2]

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[2] In the findings section of the Act, Congress determined that "beef and beef products move in interstate and foreign commerce, and beef and beef products that do not move in such channels of commerce directly burden or affect interstate commerce of beef and beef products." 7 U.S.C. § 2901(a)(6). Congress also found that "the production of beef and beef products plays a significant role in the Nation's economy." *Id.* § 2901(a)(2). These were

Instead, petitioner has substantially narrowed his Commerce Clause argument, claiming only that the Act is invalid because it does not have a public purpose. *See* Pet. at 12-13. Where, however, it is no longer disputed that the regulation at issue involves an activity that substantially affects interstate commerce, the public purpose in that regulation is grounded in the Commerce Clause itself. The very existence of the Commerce Clause among the enumerated powers of the legislature establishes that congressional regulation of activities that substantially affect interstate commerce serves a public purpose.

Congress expressly found as much when it declared that "it is in the public interest" to promote beef through a program "financ[ed] * * * through assessments on all cattle sold in the United States." 7 U.S.C. § 2901(b). Any dispute petitioner may have with the wisdom of that policy choice is a matter to be taken up with Congress, not this Court. *Cf. Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229, 241 (1984) (under Takings Clause, "the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'") (*quoting United States* v. *Gettysburg Elec. Ry.*, 160 U.S. 668, 680 (1896)).

B. The Taxing Authority. Petitioner contends that the assessment imposed under the Act is unconstitutional because it is an unapportioned direct tax in violation of Article I, Section 9, Clause 4 of the Constitution.[3] Pet. at 13-20.

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surely reasonable conclusions on Congress' part, *see* Pet. App. 14 ("'It should be beyond dispute that beef moves in and substantially affects interstate commerce, thus making the beef industry a proper object of legislation under the commerce clause.'") (quoting Pet. App. 34); *Frame*, 658 F. Supp. at 1482 ("Clearly, the beef industry affects interstate commerce and is a proper object of congressional legislation."), and petitioner does not contend otherwise.

[3] That clause provides: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." It has been rendered largely inapplicable by virtue of the Sixteenth Amendment.

This argument fails at the threshold because the Act's assessments are not "taxes" in the constitutional sense.[4] It has been established for more than a century that if a statute's primary purpose is the regulation of commerce rather than the raising of revenue, it will not be considered a tax statute. *See, e.g., Head Money Cases*, 112 U.S. 580, 595-596 (1884).[5] Petitioner in fact agrees that this is the right test to apply, *see* Pet. 13-14 (*quoting Cities Serv. Co.* v. *Federal Energy Admin.*, 529 F.2d 1016, 1029 (Temp. Emerg. Ct. App. 1975), *cert. denied*, 426 U.S. 947 (1976), for the proposition that "if regulation is the primary purpose * * * , the mere fact that incidentally revenue is also obtained does not make the imposition a tax"), and it is the test that was applied by the courts below. *See* Pet. App. 17-18; 39-40.

Thus, petitioner complains only about the application of settled law to the facts of this case—hardly the sort of issue that merits this Court's attention. *See* S. Ct. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law."). In any event, there can be no doubt that the primary purpose behind the Act is regulatory rather than revenue-raising. Congress declared in the statute itself that its "policy" was to establish a "program of promotion and research designed to strengthen the beef industry's position in the marketplace" and to "financ[e]" that program

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[4] Petitioner's claim that "the district court's opinion in *Frame* rested almost entirely upon the premise that the [assessment] is a tax," Pet. 16, is incorrect. That court only "[a]ssum[ed], *arguendo*, that the Act is an exercise of Congress' taxing power." 658 F. Supp. at 1479. Furthermore, the party challenging the Beef Promotion Act in *Frame* abandoned before the Third Circuit the claim that the assessments were a tax. 885 F.2d at 1125 n.4.

[5] *See also Brock* v. *WMATA*, 796 F.2d 481, 488 (D.C. Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987); *South Carolina* v. *Block*, 717 F.2d 874, 887 (4th Cir. 1983), *cert. denied*, 465 U.S. 1080 (1984); *Moon* v. *Freeman*, 379 F.2d 382, 391-392 (9th Cir. 1967); *United States* v. *Stangland*, 242 F.2d 843, 848 (7th Cir. 1957); *Rodgers* v. *United States*, 138 F.2d 992, 994-995 (6th Cir. 1943).

through assessments on cattle sales. 7 U.S.C. § 2901(b). Thus, the overriding purpose of the Act is the clearly regulatory goal of beef promotion; the assessment provisions merely serve that end. *See Frame*, 885 F.2d at 1134, 1135 (congressional interest served by the Act is "preventing further decay of an already deteriorating beef industry" while the assessments provide "[t]he vehicle for funding" the Act). The Act's assessments simply are not "taxes" in the relevant sense.

Petitioner's arguments to the contrary are wide of the mark. He first cites instances in the congressional debate when individual members of Congress referred to the assessment as a tax, Pet. 14-15, but there is no evidence that these members were doing anything other than employing a colloquial shorthand for the proposed assessment. Nor were the members considering whether the proposal involved a tax subject to constitutional limitations—a question on which their views would, in any event, not be controlling. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Petitioner's reliance on the flow of funds collected under the assessment, Pet. 15-16, is equally unavailing. Contrary to petitioner's suggestion, the fact that the funds at issue flow not to the Treasury but to the Board and/or to state beef councils is strong evidence that the assessment is *not* a tax. Like the funds at issue in the *Head Money Cases*, the assessments are "appropriated in advance to the uses of the statute, and do[] not go to the general support of the government." 112 U.S. at 596. *See also United States* v. *Munoz-Flores*, 495 U.S. 385, 400 (1990) ("a bill creating a discrete governmental program and providing sources for its financial support is not a revenue bill simply because it creates revenue"). The courts below correctly concluded that the assessment under the Act is not a tax subject to the constitutional limitations on taxation. Nothing in the petition establishes that there is any occasion for this Court to review that determination.

C. The First Amendment. The Court's *Wileman* decision fully disposes of petitioner's First Amendment claim, and Goetz offers no reason for the Court to revisit its recent decision in *Wileman*.

The Court granted certiorari in *Wileman* for the express purpose of resolving the conflict between the Ninth Circuit's decision in that case, which held that assessments on growers, handlers, and processors of California tree fruits to support generic advertising of those fruits violated the First Amendment, and the Third Circuit's decision in *Frame*. *See Wileman*, 117 S. Ct. at 2137. The Court held that such generic commodity advertising programs did not violate the First Amendment rights of those compelled to support them, resolving the conflict by reversing the Ninth Circuit. The Court's disposition makes it clear that the program at issue in *Frame*—the same program challenged by petitioner in this case—passes constitutional muster under the First Amendment.

Petitioner stresses the differences between the program considered in *Wileman* and that at issue here, and there are of course differences between the programs. Those differences, however, are unrelated to the factors this Court considered pertinent in *Wileman* when it held that mandatory generic advertisement programs do not violate the First Amendment. As the Court explained:

> Three characteristics of the regulatory scheme at issue distinguish it from laws that we have found to abridge the freedom of speech protected by the First Amendment. First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views. [*Id.* at 2138 (footnotes omitted).]

These three characteristics of the program in *Wileman*—which the Court found determinative in upholding its constitutionality—are also present in this case:

First, the Act does not restrict Goetz—or anyone else—from conveying any message to anybody, and Goetz does not contend otherwise.

Second, the Act does not compel Goetz—or anyone else—to engage in any actual or symbolic speech. Like those subject to the program upheld in *Wileman*, Goetz and other cattlemen subject to the Beef Promotion and Research Act "are not required themselves to speak, but are merely required to make contributions for advertising." *Id.* at 2139.

Third, while the Act compels producers to support generic advertising of the commodity they market, it does "not compel the producers to endorse or to finance any political or ideological views." *Id.* at 2138. Indeed, the Act expressly prohibits any use of assessment funds for political purposes, *see* 7 U.S.C. § 2904(10), and, as the *Frame* court explained, "[t]he purpose underlying the Beef Promotion Act is ideologically neutral. The federal government seeks to bolster the image of beef solely to increase sales; it harbors no intent to 'prescribe orthodoxy.'" 885 F.2d at 1135. *Compare Wileman*, 117 S. Ct. at 2139-40 ("requiring respondents to pay the assessments cannot be said to engender any crisis of conscience. None of the advertising in this record promotes any particular message other than encouraging consumers to buy California's tree fruit").

Petitioner claims that the Act does compel him to finance ideological views because the advertising conveys the view that "consumption of beef is healthy and desirable in the face of contrary medical evidence." Pet. 22. In rejecting similar claims in *Wileman*, the Court held that respondents' "disagreement with particular messages" has "no bearing on the validity of the entire program." 117 S. Ct. at 2137. *See also id.* at nn. 10 & 11. Instead, the Court noted that "our cases provide affirmative support for the proposition that assessments to fund a lawful collective program may some-

times be used to pay for speech over the objection of some members of the group." *Id.* at 2140 (*citing Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507 (1991)). In any event, petitioner pointedly does *not* claim in his petition to disagree with the views expressed in the advertising at issue, and thus, even if the advertising were considered to involve ideological issues, the assessments would not "require [him] to use [his] own property to convey an *antagonistic* ideological message." *Wileman*, 117 S. Ct. at 2139 (emphasis added).

In short, this case is indistinguishable from *Wileman* on the grounds on which the Court relied in upholding the commodity promotion program at issue in that case. *Wileman* thus controls petitioner's First Amendment claim, and there is no reason to revisit that decision one year after it was issued. Even if there were pertinent differences between the program at issue in *Wileman* and the beef promotion program at issue here, petitioner offers no "compelling reason," S. Ct. Rule 10, for the Court to undertake consideration of the application of *Wileman* to various individual commodity promotion programs on a case-by-case basis. [6]

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[6] Even if *Wileman* were for some reason distinguishable from this case—which it is not—that would *not* compel the conclusion that the Act is unconstitutional. We argued alternatively below that the speech at issue is government speech and therefore not subject to First Amendment challenge. *See* Brief for Intervenors-Appellees 14-26. This Court in *Wileman* did not consider a government speech argument. *See* 117 S. Ct. at 2145 n.2 (Souter, J., dissenting) (noting that the Secretary of Agriculture had waived the argument that "the advertisements at issue represent so-called 'government speech,' with respect to which the government may have greater latitude in selecting content than otherwise permissible under the First Amendment") (*citing Keller* v. *State Bar of Cal.*, 496 U.S. 1 (1990), and *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 259 n.13 (1977) (Powell, J., concurring in the judgment)). In this case, that argument has been expressly raised and preserved below. Therefore, that issue would remain to be decided if Goetz's First Amendment challenge to the Beef Promotion and Research Act were not foreclosed on the basis of *Wileman*.

D. Equal Protection. There is no need to discuss petitioner's equal protection claim at any length. Petitioner's bid for strict scrutiny rests completely on his First Amendment claim, which was properly rejected by the Tenth Circuit for the reasons discussed above. Rather than burdening free speech rights and being subjected to strict scrutiny, the Act is a classic example of legislation that adjusts the benefits and burdens of economic life and need only be shown to have a rational basis to pass muster under the Fifth Amendment. *See FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); *National R.R. Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. 451, 476-477 (1985). The Tenth Circuit's determination that the Act satisfies the rational basis test involves no issue of any broader significance, is plainly correct, and provides no occasion for this Court to exercise its certiorari jurisdiction.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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